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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1969

No. 1106.

DYMO INDUSTRIES, INC. and MODULUX, INC.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR THE WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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Abbreviations Used in this Brief

"Dymo" refers to Dymo Industries, Inc., one of the petitioners.

"Modulux" refers to Modulux, Inc., one of the petitioners, now merged into Dymo.

"App. ....." refers to the appendix to this petition for the writ of certiorari and pagination.

"Tr. ....." refers to the record on appeal in the Ninth Circuit and pagination.

"Opening Brief ....." refers to Appellants' Opening Brief filed in the Court of Appeals, Appeal No. 24,930 and pagination.

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PETITION FOR THE WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

Petitioners pray that the writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this cause on December 19, 1969.

OPINIONS BELOW

The opinion of the Court of Appeals dated December 19, 1969 is reported at ..... F.2d ..... and is reprinted in the

Appendix, page xxiii. The opinion of the District Court is reported at 300 F.Supp. 532 and is reprinted in the Appendix, page xiii.

JURISDICTION

The judgment of the Court of Appeals was entered on December 19, 1969 (App. xxiv). Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). Jurisdiction in the Court of Appeals was based on 28 U.S.C. 1291. Jurisdiction of the District Court was based on 15 U.S.C. 23.

QUESTION PRESENTED

May a corporation be held in civil contempt for refusing to obey a *subpoena duces tecum* issued by a United States District Court, at the request of the Antitrust Division of the Department of Justice, commanding that corporation to bring corporate documents before the Grand Jury where the Antitrust Division refuses to produce any evidence of "probable cause, supported by Oath or affirmation" and where the corporation urges that such a search and seizure violates the Fourth Amendment to the Constitution of the United States?

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution of the United States which provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable

searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

The judgment below (App. xxiv) affirms an order and judgment of the District Court holding petitioners in civil contempt and fining them jointly and severally $1,000 (App. xxi-xxii). The contempt found was based upon the refusal of Dymo and Modulux to produce documents for the inspection of a Federal Grand Jury.

The controversy began with the issuance of two *subpoenas* on application of the United States Department of Justice, Antitrust Division, commanding Dymo and Modulux to appear before the Grand Jury and to produce corporate documents described in six single-spaced pages (Tr. 3-9, 47-60, see App. i-xii). Dymo and Modulux brought a motion to quash those two *subpoenas* (Tr. 1-16). After briefing and oral argument, the District Court by Memorandum and Order denied the motion to quash (Tr. 37-43, App. xiii, 300 F.Supp. 532).

As noted in the District Court opinion, Dymo and Modulux made the contention that the *subpoenas* violated the Fourth Amendment (App. xiii). As there stated, "The sole question to be answered is whether or not the Fourth Amendment requires that issuances of subpoenas duces tecum be based on good cause." (App. xiv-xv). In posing the question, the District Court said, "This Court's defini-

tion of 'good cause' includes the meaning of 'probable cause' which is required for the issuance of warrants by the Fourth Amendment." (App. xv). Upon its review of the authorities, the District Court referred to "the traditional principle that good cause is not a necessary basis for grand jury inquiry in view of the Fourth Amendment's prohibition against unreasonable searches and seizures." (App. xvii) and concluded, "that the subpoenas in question are lawful without a showing that their issuance was based on good cause." (App. xx).

There being no appeal from the denial of a motion to quash [*Cobbledick v. United States* (1940), 309 U.S. 323], Dymo and Modulux felt that "it was necessary for them to refuse to produce and to submit themselves to the mercies of the Court on a contempt motion." (Tr. 74). Counsel for Dymo and Modulux did appear before the Grand Jury on behalf of both of those corporations and on their behalf refused to produce the documents (Tr. 62-64) on the ground that "We think that there is a very serious question as to whether the subpoena duces tecum complies with the requirements of the Fourth Amendment to the Constitution. . . ." (Tr. 64).

The Government then moved the District Court for an order requiring Dymo and Modulux to show cause why they should not be found in civil contempt (Tr. 44-46). Dymo and Modulux, in their written return on the order to show cause, urged the following defenses (Tr. 71-72):

> "1. Petitioner has made absolutely no showing that the Grand Jury sitting in this District, as distinguished from the Antitrust Division of the Department of Justice, even desires to see any of the documents

specified in either Exhibit A or Exhibit B attached to the motion.

"2. Petitioner has made absolutely no showing either from an examination of witnesses orally, or from the known transaction of respondents with other companies, nor has it produced some evidence justifying an inquisition by the Grand Jury into the general conduct or private business of respondents and permitting it to hunt up alleged offenses on the part of the respondents.

"3. Petitioner has made absolutely no showing of 'probable cause, supported by oath or affirmation' required by the Fourth Amendment to the Constitution warranting a search and seizure of respondents' papers by means of a subpoena duces tecum."

At the oral hearing on the return of the order to show cause, the Government stood pat and introduced nothing in support of its subpoenas. The District Court forthwith found both Dymo and Modulux in civil contempt and ordered that each of them, jointly and severally, pay a fine of $1,000 (Tr. 79-80).

On their appeal to the Court of Appeals for the Ninth Circuit, Dymo and Modulux argued that the order holding them in contempt violates the Fourth Amendment to the Constitution (Opening Brief, p. 4). The argument was virtually a syllogistic application of the admitted facts to the clear mandate of the Fourth Amendment. Basing their argument upon the clause that ". . . no warrants shall issue, but upon probable cause, supported by Oath or affirmation . . .", they urged that a *subpoena duces tecum* is a warrant under the Fourth Amendment in view of *Boyd*

v. United States (1886), 116 U.S. 616 and *Hale v. Henkel* (1906), 201 U.S. 43 (Opening Brief, pp. 5-8). They further argued that there must be proof of probable cause supported by oath or affirmation in view of *Hale v. Henkel* (1906), 201 U.S. 43 at page 77; *Silverthorne Lumber Co. v. United States* (1920), 251 U.S. 385 at page 392; and *Mancusi v. DeForte* (1968), 392 U.S. 364 at page 371 (Opening Brief, pp. 8-10).

The Court of Appeals, in a one-sentence *per curiam* opinion, handed down one day after oral argument, affirmed the District Court as follows (App. xxiii):

> "The order appealed from is affirmed for the reasons stated in the opinion of the District Court. *In re Dymo Industries, Inc.*, D.C.N.D.Cal., 1969, 300 Fed. Supp. 532."

REASONS FOR GRANTING THE WRIT

1. In holding "that the subpoenas in question are lawful without a showing that their issuance was based on good cause" (App. xx), the decision below conflicts with that provision of the Fourth Amendment which provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation . . ." This Court in *Boyd v. United States* (1886), 116 U.S. 616, at pages 621-622, 624, 631-632 and 634-635; *Hale v. Henkel* (1906), 201 U.S. 43, at pages 76-77; and *Mancusi v. DeForte* (1968), 392 U.S. 364, at page 371, has made it clear that Fourth Amendment protection applies to *subpoenas duces tecum* as well as to warrants. This being so, the Fourth Amendment, by its own terms, requires a showing of probable

cause supported by oath or affirmation. There is nothing vague or indefinite in that requirement. No exceptions are recited in the Fourth Amendment merely because a prosecuting authority desires documents for presentation to a Grand Jury.

2. In not requiring a showing that the issuance of the subpoenas was based on good cause, the decision below conflicts with *Hale v. Henkel* (1906), 201 U.S. 43, at pages 76-77 and *Silverthorne Lumber Co. v. United States* (1920), 251 U.S. 385, at page 392.

In *Hale,* this Court noted particularly, 201 U.S. at page 76, that "the substance of the offense is the compulsory production of private papers, whether under a search warrant or a *subpoena duces tecum,* against which the person, be he individual or corporation, is entitled to protection." For such a *subpoena duces tecum* to be justified, this Court said, page 77, "some necessity should be shown, either from an examination of the witnesses orally, or from the known transactions of these companies with the other companies implicated, or some evidence of their materiality produced, to justify an order for the production of such a mass of papers." As Mr. Justice McKenna pointed out in his concurring opinion with reference to the foregoing quotation, page 81, "This intimates a different objection to the order of the court than the generality of the subpoena, and, if good at all, would be good even though few instead of many documents had been required or described ever so specifically. I am constrained to dissent from it."

3. In working up to its conclusion that the subpoenas in question are lawful without a showing that their is-

suance was based on good cause, the opinion below fails to cite a single authority in which any person, corporate or otherwise, was held in contempt merely for refusing to produce documents before a Grand Jury where the prosecuting authority refused to produce any evidence of "probable cause, supported by Oath or affirmation." Instead, the opinion relies upon dictum taken from cases where the present issue was not squarely presented. And as the Government well stated to the District Court (Tr. 77), "The purpose of a civil contempt is *to coerce* compliance with lawful orders of the court" (emphasis added). Such treatment of the Bill of Rights, and particularly the Fourth Amendment, is contrary to sound public policy. As this Court said in *Boyd,* 116 U.S. at page 631:

> ". . . And any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime, or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom."

4. There having been cited no authority squarely in point, the failure of the courts below to grant the Fourth Amendment a liberal construction is in conflict with *Boyd v. United States* (1886), 116 U.S. 616, at page 635:

> ". . . Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet, as before said, it contains their substance and essence, and effects their substantial purpose. It may be that it is the obnoxious thing in its

> mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis. . . .*"

For the reasons pointed out, petitioners urge that the writ should be granted. Only thus may *obsta principiis* be given true effect in protecting petitioners' Fourth Amendment rights. Unless petitioners' rights are protected; the way is left clear for the present encroachments to grow at the expense of the public at large.

Dated, San Francisco, California,
January 20, 1970.

Respectfully submitted,
CARL HOPPE,
Attorney for Petitioners.

(Appendix Follows)

Appendix

United States District Court
for the Northern District of California

To Dymo Industries, Inc.
6701 Bay Street
Oakland, California

You are hereby commanded to appear in the United States District Court for the Northern District of California at Room 17201 450 Golden Gate Avenue in the city of San Francisco on the 2nd day of April 1969 at 10:00 o'clock A.M. to testify before the Grand Jury and bring with you the corporate documents described in the attached Appendix A.

This subpoena is issued on application of the United States.

C. C. Evensen, Clerk.
By John R. Pomeroy, Jr., Deputy Clerk.

Date March 13, 1969.

Inquiries concerning this subpoena should be addressed to:

Shirley Z. Johnson
Antitrust Division
Dept. of Justice
450 Golden Gate Ave.—Room 16432
Box 36046

Appendix A

A. "Addressee" means the firm to which this subpoena is addressed, and *each subsidiary which is or was engaged in the sale of relocatable buildings* and any predecessor firm of such subsidiary and any firms merged to form such subsidiary. Where documents are requested below, please supply them separately for the firm to which this subpoena is adddressed and for each such subsidiary.

B. "firm" means any individual, association, cooperative, partnership or corporation;

C. "relocatable building(s)" means any building, whether called "portable," "relocatable," "movable" or by other name, which is either manufactured at the seller's plant and assembled at the purchaser's or lessee's site or which is manufactured and assembled at the seller's plant and moved to the purchaser's or lessee's site.

D. "documents" means any written or recorded material in the possession or control of Addressee (as the term "Addressee" is defined above), its officers, directors, agents, attorneys and employees or any of them;

E. "sold" or "sale" or forms thereof, such as is used in the phrase "relocatable buildings sold by Addressee," means any relocatable building purchased or leased by a customer;

F. "seller" means any firm which leases or sells relocatable buildings;

G. "meetings" includes formal, informal, business and social gatherings.

Each paragraph of this Appendix is limited to and covers the period from January 1, 1964, to the date of the issuance of this subpoena, unless otherwise more specifically limited.

Where originals are to be produced and the originals are not in the possession of Addressee and its subsidiaries above described or are otherwise unavailable, copies should be produced.

I

A copy of Addressee's Articles of Incorporation, together with amendments thereto (or in lieu thereof, at the option of Addressee, a statement certified by a proper official of Addressee setting forth the true corporate or other name of Addressee, its date and state of incorporation, and the location of its principal place of business).

II

Originals of all documents (or in lieu thereof, at the election of Addressee, a statement certified by a proper official of Addressee setting forth the requested information) as will show:

A. The address of Addressee's main business office and of each branch office engaged in the sale of relocatable buildings;

B. The name, title and business address of each of the corporate officers, directors and partners of Addressee, together with the inclusive dates for the term of office held by each;

C. The name, title, term of office, business address and last known home address of each officer, partner and employee of Addressee who prepared or computed or assisted in any way in the preparation or computation of prices, quotations and bids utilized by Addressee in the sale of relocatable buildings;

D. The total dollar amount of materials, including, but not limited to, plywood, lighting fixtures, heating and cooling equipment, bolts and wire, purchased by Addressee from suppliers located outside the State of California which were used in the manufacture and construction of relocatable buildings in the State of California for each of the calendar years 1967 and 1968;

E. The total dollar amount of materials, including, but not limited to, plywood, lighting fixtures, heating and cooling equipment, bolts and wire, purchased by Addressee from suppliers located in the State of California which were used in the manufacture and construction of relocatable buildings sold in the State of California for each of the calendar years 1967 and 1968;

F. The geographical areas in which Addressee has sold relocatable buildings;

G. The geographical areas in which Addressee has sold relocatable buildings which were manufactured outside the State of California;

H. The total annual dollar gross income of Addressee from relocatable building sales received from (1) purchasers located in the State of California; (2) lessees located in the State of California; (3) purchasers located

outside the State of California; and (4) lessees located outside the State of California. (Separately stated.)

I. The total annual dollar gross income of Addressee from relocatable building sales received (1) from lessees of relocatable buildings manufactured in the State of California; (2) from lessees of relocatable buildings manufactured in the State of California; (3) from purchasers of relocatable buildings manufactured outside the State of California, and (4) from purchasers of relocatable buildings manufactured outside the State of California. (Separately stated.)

J. All telephone numbers of Addressee and the period they have been assigned to Addressee.

K. The name and address of any parent firm of Addressee and a description of its supervisory duties concerning Addressee.

III

A copy of the most recent balance sheet and of the latest annual statement of profit and loss of Addressee.

IV

A copy of the most recent balance sheet and of the latest statement of profit and loss of Addressee relating to its sales of relocatable buildings and relating to its sales of relocatable buildings in the State of California.

V

Originals of all minutes, notes, reports and other documents regarding meetings of the Board of Directors, exec-

utive committee and other boards and committees of Addressee, which relate to prices to be charged or bid by Addressee or any other seller of relocatable buildings for the sale of relocatable buildings and to the allocation of relocatable building jobs between and among relocatable building sellers.

VI

A copy of each bid or quotation submitted or proposed to be submitted by Addressee for the sale of relocatable buildings, together with all work papers, work sheets, material take-off sheets, computations, memoranda, notes and other documents concerning prices to be bid by Addressee, or prices to be bid by any other relocatable building seller, and other supporting papers from which each of these bids and quotations were computed.

VII

Originals of all documents as will show:

A. Acceptance or rejection by the awarding authority (purchaser or lessee) of each of the bids or quotations of Addressee described in Section VI, above;

B. all sales and leases of relocatable buildings by Addressee.

VIII

Originals of all work sheets, memoranda, letters, notes, lists, compilations, computations, reports, surveys, estimates, forecasts and other documents in the possession of Addressee relating to the following subject matters, or to any of them:

A. Designation of which relocatable buildings seller is to bid low and which relocatable building seller or sellers are to bid high on specified jobs;

B. Prices bid or quoted by Addressee or any of its competitors on any relocatable building job or group of jobs;

C. Allocation of relocatable building jobs between or among relocatable building sellers;

D. Assignment of relocatable building jobs to any relocatable building seller or sellers;

E. Costs applicable to relocatable building jobs;

F. Proposals, suggestions and understandings concerning action to meet competition of particular relocatable building sellers; and action taken thereon;

G. Market studies and research analyses including but not limited to the volume of work done by Addressee and competing sellers of relocatable buildings;

H. The names of relocatable building sellers and the dollar volume of work performed by such sellers or awarded to such sellers;

I. The dollar volume of relocatable building jobs awarded to sellers of relocatable buildings;

J. The relative position of relocatable building sellers based on the dollar volume of work performed by each.

IX

Originals of all documents exchanged by and passing between or among Addressee, its officers, partners and

employees, and any of the following, their officers, partners and employees:

Designed Facilities Corporation
Dymo Industries, Inc.
Manufacturers' Association of the
Relocatable Building Industry (MARBI)
Modulux, Inc.
Speedspace Corporation
Structural Systems, Inc.
Vinnell Steel
Any other relocatable building seller
Any officer, director, partner, or employee
of a relocatable building seller

relating to the following subject matters, or to any of them:

A. Conversations, telephone calls and meetings between and among relocatable building sellers, their officers, directors, partners and employees, or any of them;

B. Proposed, suggested, recommended or actual prices, bids, terms, and conditions of sale of relocatable buildings;

C. Proposals, suggestions, and understandings concerning the establishment, maintenance, and alteration of prices, bids, terms, and conditions of sale of relocatable buildings;

D. Reports and complaints concerning prices or terms quoted or bid in the sale of relocatable buildings;

E. Allocation and division of bids, jobs, customers, or territories in the sale of relocatable buildings;

F. Proposals, suggestions, and understandings concerning the allocation and division of bids, jobs, customers, or territories in the sale of relocatable buildings;

G. Reports and complaints concerning selling relocatable buildings or bidding for relocatable building jobs in violation of any such allocation or division; and action proposed or taken thereon;

H. Explanations of, defenses to, and denials and admissions of charges, reports and complaints of violating any allocation or division of relocatable building jobs or of bid price assigned;

I. Formulas, procedures, means and methods by which prices, quotations, and bids for the sale of relocatable buildings are determined, computed, quoted, or bid;

J. Proposals, suggestions and understandings concerning the establishment, maintenance, and alteration of formulas, procedures, means and methods by which prices, quotations, and bids for the sale of relocatable buildings are determined, computed, quoted, or bid;

K. The designation or selection of the relocatable building seller who is to bid low and the seller or sellers who are to bid high in response to requests or invitations to bid on relocatable buildings;

L. Proposals, suggestions, and understandings concerning the designation or selection of the relocatable building seller who is to bid low and the seller or sellers who are to bid high on requests or invitations to bid on relocatable buildings;

M. Reports and complaints concerning bids for the sale of relocatable buildings; and action proposed or taken thereon;

N. Action, contemplated or taken, to meet or to underbid prices and bids of competing sellers of relocatable buildings;

O. Requests for and exchange or transmittal of prices or actual or proposed bids for relocatable buildings;

P. Price studies, competitive prices, price trends and any other market research analyses on the sale of relocatable buildings;

Q. Material, labor, and other costs of relocatable building jobs;

R. The percentage or share of relocatable building jobs performed by any relocatable building seller;

S. The dollar volume of relocatable building work performed by relocatable building sellers and the relative position of Addressee and its competitors based on a comparison of the dollar volume of work performed by each;

T. Agreements, arrangements or understandings, formal or informal, as to the price to be bid for any relocatable building job.

X

Originals of all intra-office and inter-office documents exchanged by and passing between and among the directors, officers, employees, and any parent or subsidiary corporation of Addressee, or any of them, relating to the following, or any of them:

(1) subject matters listed in IX, subparagraphs A through T, immediately above;

(2) the computation, adoption and change by Addressee of relocatable building prices, terms and conditions of sale and installation;

(3) orders, policies, instructions or discussions concerning preparing, computing and submitting bids for the sale of relocatable buildings.

XI

Originals of all expense vouchers and other expense account claims submitted to Addressee by each of the persons named by Addressee in response to subparagraphs II B and to II C above, together with all supporting claims, receipts, bills, and other explanatory attachments to each of said expense accounts and expense vouchers.

XII

Originals of all minutes, notes, reports and any other documents relating to meetings or committee or subcommittee meetings of any members of the Manufacturers' Association of the Relocatable Building Industry (MARBI) in the control or possession of Addressee concerning any of the subjects described in IX, subparagraphs A through T, and in X, above, and in any of them.

XIII

Originals of all documents relating to the purpose(s) of the Manufacturers' Association of the Relocatable Building Industry (MARBI), its formation and the reason(s) it was formed and any of them.

XIV

Originals of all appointment books, desk calendars, notes or telephone calls and similar documents maintained by officers, directors or employees of Addressee relating to meetings between and among sellers of relocatable

buildings, Addressee, their officers, directors, or employees, or any of them; to telephone calls between and among sellers of relocatable buildings, Addressee, their officers, directors, or employees, or any of them; and to the price to be bid for any relocatable building job.

XV

A copy of all telephone bills, toll charge records and other documents in the possession of Addressee as will show each and any telephone calls made or received by any officer, director or employee of Addressee to or from any seller of relocatable buildings.

In the United States District Court
for the Northern District of California

Misc. No. 10069

In the Matter of the Grand Jury Subpoenas Duces Tecum Addressed to Dymo Industries, Inc. and to Modulux, Inc.

MEMORANDUM AND ORDER

On March 13, 1969, subpoenas duces tecum issued out of this Court commanding Dymo Industries, Inc. and Modulux, Inc. to produce documentary evidence before the Grand Jury for the Northern District of California. The two corporations have filed motions to quash the subpoenas as being violative of the Fourth Amendment to the United States Constitution.

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." Movants contend that the subpoenas issued for the Grand Jury are illegal in that they are initiated by the Antitrust Division of the Department of Justice and that they are not issued upon "good cause". The Court has considered both of these reasons and concludes that neither is a basis for quashing the subpoenas.

The grand jury is a creation of the Fifth Amendment and is not wholly identifiable with any one of the three traditional branches of government. See *In Re April 1956 Term Grand Jury*, 239 F.2d 263 (7th Cir. 1956). The grand jury may conduct investigations on its own initiative or under the direction of the prosecuting agency. *United States v. Thompson*, 251 U.S. 407 (1920). The prosecuting agency may not use for its own purposes the processes available to the grand jury. *E.g., Durbin v. United States*, 221 F.2d 520 (D.C.Cir. 1954). This does not mean, however, that the grand jury is being abusively used by the Department of Justice whenever a matter is submitted by the Department to the grand jury for consideration. An investigation conducted at the initiative of the Department of Justice is and always has been a proper function of the grand jury. See *Hale v. Henkel*, 201 U.S. 43 (1906).

Movants further contend that the subpoenas are unlawful because they are not based on "good cause". This contention also lacks merit. The broadness of the grand jury's inquisitorial powers is too well-settled to require extensive discussion. See *e.g., United States v. United States District Court for the Southern District of West Virginia*, 238 F.2d 713 (4th Cir. 1956). It is also settled that the grand jury's powers are not immune from application of the Fourth Amendment limitation against unreasonable searches and seizures. See *Application of Certain Chinese Family Benevolent and District Associations*, 19 F.R.D. 97 (N.D.Cal. 1956). No contention is made here that the subpoenas are unreasonable in scope. The sole question to be answered is whether or not the Fourth

Amendment requires that issuances of subpoenas duces tecum be based on good cause.

Before discussing the issue presented here, the phrase "good cause" as used in this memorandum should be defined to avoid any misunderstanding. Movants have used the phrase without defining it other than by arguing that the grand jury's subpoena must "include good cause based upon something other than an unexplained desire to investigate." This Court's definition of "good cause" includes the meaning of "probable cause" which is required for the issuance of warrants by the Fourth Amendment. It further includes anything more or less than such probable cause which movants may contend is necessary to sustain the lawfulness of a grand jury subpoena.

In support of their contention that good cause is necessary, movants have quoted the following language from *Hale v. Henkel,* 201 U.S. 43, 77 (1905):

> "[S]ome necessity should be shown, either from an examination of the witnesses orally, or from the known transactions of these companies with the other companies implicated, or some evidence of their materiality produced, to justify an order for the production of such a mass of papers."

A careful reading of *Hale v. Henkel* reveals that the necessary showing referred to in the above quoted language relates to a necessity which would sustain the massive scope of the subpoena there involved which was otherwise unreasonable. For this reason, *Hale* is not authority for movants' position.

None of the other cases cited by movants in support of their contentions are persuasive. Independent research

by this Court has not come across any case which supports movants' position. To the contrary, authority in opposition to movants' contentions can be found.

In *Wilson v. United States,* 221 U.S. 361 (1911), the Supreme Court answered a contention similar to the one made here by movants by saying at page 372:

> "The objections to the jurisdiction on the ground that there was no 'cause' or 'specific charge' pending before the grand jury were made and answered in Hale v. Henkel, 201 U.S. 43, and require no further examination."

In *Blair v. United States,* 250 U.S. 273 (1919), the grand jury's function was described by the court at page 282 in the following manner:

> "The Fifth Amendment and the statutes relative to the organization of grand juries recognize such a jury as being possessed of the same powers that pertained to its British prototype, and in our system examination of witnesses by a grand jury need not be preceded by a formal charge against a particular individual . . . . It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime. *As has been said before, the identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning.*" [Emphasis added].

See also, *Hendricks v. United States,* 223 U.S. 178 (1912).

These cases establish the principle that the grand jury's purpose is to determine whether cause exists upon which

an indictment would lie and its investigatory powers are not limited only to cases in which such cause exists. However, movants have alerted this Court to the possibility that this principle has eroded to some degree by quoting Meshbesher, Right to Counsel Before Grand Jury, 41 F.R.D. 189, 204 (1966):

> "[T]he developments in the constitutional-criminal procedure field have been so explosive in recent years that even a case decided only a decade ago must be viewed as 'ancient history'. The continued validity of authorities is not to be measured by the mere passage of calendar years, but rather by the significance and magnitude of subsequent developments."

It is true that developments in the criminal procedure field have sometimes required reconsideration of time-honored principles. With this in mind, the Court has delved beyond the traditional principle that good cause is not a necessary basis for grand jury inquiry in view of the Fourth Amendment's prohibition against unreasonable searches and seizures.

The Fifth Amendment's requirement that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury" is not without purpose. The reason for this requirement was early explained in *Hale v. Henkel, supra,* and recently reaffirmed in *Wood v. Georgia,* 370 U.S. 375 (1962), where Mr. Chief Justice Warren delivering the opinion for the Court said at page 390:

> "Historically, this body has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused, whether the latter be an

> individual, minority group, or other, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will."

See also, *Jenkins v. McKeithen*, 395 U.S. 411 (June 9, 1969). It may be argued, as it sometimes has been, that this principle is theoretical and unrealistic. The charge is sometimes made that the grand jury is merely a rubber stamp process at the mercy of the United States Attorney's office. See Meshbesher, *supra*, at 189. This cynical description is simply not true. The grand jury process may at times give appearance of a formality exercised without judgment. This appearance, however, is not the necessary result of undue control by the prosecuting agency. The very existence of the grand jury process serves as a deterrent against unwarranted accusations by the prosecuting agency. This results in many cases being presented to the grand jury in which the existence of probable cause for an indictment is so obvious that little thought is required to determine the existence of such cause. It is true that this factor could easily lead to abuse, but such abuse is not the subject of movants' attack in this case. The important thing is that the "rubber stamp" accusation is little authority for curbing the *investigatory* function of the grand jury as opposed to its function of *returning indictments*.

Another reason exists why it is not unrealistic to expect the grand jury to live by its purpose. At the inception of every grand jury, the jurors are charged with their duties under oath. An excerpt of Judge Kaufman's charge to the grand jurors in the Southern District of New York is typical:

> "Your prime function is to decide whether or not sufficient evidence has been produced to indicate that a crime probably has been committed by the person accused. Or, stated another way: if upon the credible evidence which you have heard, absent an explanation by the defendant, you would be willing to convict, you should indict. If the evidence produced does not meet the standard necessary for an indictment because you are convinced that you cannot conclude that a crime probably has been committed by the accused, you should have no hesitancy in refusing to vote an indictment.
>
> "You observe therefore that you are performing the critical task of standing as a bulwark between prosecutor and citizen. You have the protection and liberty of the members of this community in your charge." Kaufman, The Grand Jury—Its Role and Its Powers, 17 F.R.D. 331 (1956).

To suppose that lay members of the community will balk at such a charge and simple act as a tool of the prosecuting agency is unsupportable as a general proposition. The degree of control, if any, over the workings of the grand jury varies with the variations in individuals who make up our society. This characteristic is what was intended to be made a part of our federal system of justice. Judge Kaufman ably describes it in the following words:

> "[T]he grand jury is so inherently independent of pressures from official and unofficial sources in our society, that a former United States Attorney for the Southern District of New York aptly described it in these words: 'In a sense, but in a very high sense, it is an irresponsible body; nobody can call it to account for its decisions, either in favor of an indictment or against an indictment.' It is this dis-

> connection from control that is so potentially valuable; with it comes grave responsibility for those who will sit as grand jurors. Their power as grand jurors is unique, and the manner in which they use it will depend completely on how much or little they act as responsible individuals in an 'irresponsible body.'" Kaufman, *supra,* at 334-335.

If the grand jury is charged with performing the task of determining whether cause exists upon which an indictment may be returned, it is senseless to argue that such cause must exist to conduct an investigation. Such a determination requires investigatory powers of cases without a pre-determination of the existence of good cause. In other words, the function the grand jury is charged with performing is itself the very basis for its investigation of cases whether or not good cause does in fact exist. In this respect, the Fourth Amendment presents no conflict with the Fifth Amendment's establishment of the grand jury process. Cf. *Oklahoma Press Publishing Co. v. Walling, Wage and Hour Administrator,* 327 U. S. 186 (1946).

It is therefore the conclusion of this Court that the subpoenas in question are lawful without a showing that their issuance was based on good cause. The Court has not been made aware of any reason why the investigation under attack here is otherwise abusive or oppressive which would require some control. Accordingly, IT IS HEREBY ORDERED that the motion to quash the subpoenas duces tecum be, and the same is hereby denied.

Dated: June 16, 1969.

Oliver J. Carter,
United States District Judge.

In the United States District Court
for the Northern District of California

Misc. No. 10069

UNITED STATES OF AMERICA,
Petitioner,

vs.

DYMO INDUSTRIES, INC., and
MODULUX, INC.,
Respondents.

ORDER AND JUDGMENT

The petition of the United States of America for an order holding respondents in civil contempt having come on for hearing on September 17, 1969, and the Court having heard and considered the arguments of the parties hereto;

Now, Therefore, It Is Hereby Ordered That:

1. Respondents Dymo Industries, Inc., and Modulux, Inc., be held in civil contempt of this Court and that each of them, jointly and severally, pay a fine of $1,000;

2. Execution of this sentence is to be stayed on appeal of this order and until such time as the mandate is returned to this Court;

3. Execution of this sentence is to be permanently suspended should respondents comply with the grand jury

subpoena duces tecum in question prior to the return of the mandate to this Court.

Dated: September 17, 1969.

Oliver J. Carter,
United States District Judge

Approved as to form:

Gilbert Pavlovsky,
Attorney for Petitioner,
United States of America.

Carl Hoppe,
Attorney for Respondents,
Dymo Industries, Inc., and
Modulux, Inc.

Entered in Criminal Docket Sept. 18, 1969.

United States Court of Appeals
for the Ninth Circuit

No. 24,930

UNITED STATES OF AMERICA,
Appellant,

vs.

DYMO INDUSTRIES, INC., and
MODULUX, INC.,
Appellees.

[December 19, 1969]

Appeal from the United States District Court
for the Northern District of California

Before: Hamley, Browning and Duniway,
Circuit Judges

Per Curiam:

The order appealed from is affirmed for the reasons stated in the opinion of the District Court. *In re Dymo Industries, Inc.*, D.C.N.D.Cal., 1969, 300 Fed.Sup. 532.

United States Court of Appeals
for the Ninth Circuit

No. 24,930

UNITED STATES OF AMERICA,	*Appellant,*
vs.	
DYMO INDUSTRIES, INC., and MODULUX, INC.,	*Appellees.*

Appeal from the United States District Court
for the Northern District of California

JUDGMENT

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1106

DYMO INDUSTRIES, INC., AND MODULUX, INC.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. xxiii) is not yet reported. The opinion of the district court (Pet. App. xiii) is reported at 300 F. Supp. 532.

JURISDICTION

The judgment of the court of appeals affirming the judgment of the district court was entered on December 19, 1969 (Pet. App. xxiv). The petition for a writ of certiorari was filed on January 22, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

375-867—70

QUESTION PRESENTED

Whether the Fourth Amendment requires a showing of probable cause as the condition precedent to the issuance of a grand jury subpoena *duces tecum*.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

This case arose out of a grand jury investigation into possible violations of the antitrust laws by individuals and corporations engaged in the sale of relocatable buildings of the type sold to school districts for use as classrooms. Pursuant to 28 U.S.C. 515, attorneys for the Antitrust Division were given written authority by the Attorney General to conduct grand jury proceedings within the Northern District of California and other districts. Subsequently, on the application of these attorneys, the clerk of the district court issued two identical grand jury subpoenas *duces tecum* (Pet. App. i–xii) addressed to two corporations, Dymo Industries, Inc., and Modulux, Inc., the petitioners here.

On April 18, 1969, Dymo and Modulux filed a motion to quash the subpoenas, which the district court denied after a full hearing in an extensive opinion (Pet. App. xiii–xx). Dymo and Modulux were therefore notified to appear before the grand jury on July 9, 1969, to produce the corporate documents demanded by the subpoenas. The corporations' attorney appeared on their behalf but refused to produce any documents whatsoever. He testified that his clients refused to produce on the ground that "We think that there is a very serious question as to whether the subpoena *duces tecum* complies with the requirements of the Fourth Amendment to the Constitution * * *" (Pet. 4).

On July 17, 1969, the United States moved for an order to show cause why Dymo and Modulux should not be found in civil contempt. After a hearing the court held Dymo and Modulux guilty of civil contempt and ordered that each pay a fine of $1,000 unless they produced the documents (Pet. App. xxi–xxii). On the appeal of Dymo and Modulux from the district court order, the court of appeals affirmed on the opinion of the district court on the motion to quash (Pet. App. xxiii–xxiv).

ARGUMENT

The courts below were correct in finding contumacious petitioners' refusal to comply with the grand jury's subpoena *duces tecum*. Further review—which would foreclose the possibility of compliance with the subpoena because the grand jury will expire[1]—is unwarranted.

[1] The grand jury has been continued to April 3, 1970.

The requirement of probable cause applicable to a search warrant under the Fourth Amendment does not govern the issuance of a subpoena *duces tecum* by a court in aid of a grand jury. That body's function as prescribed in the Fifth Amendment is inquisitorial—to determine from the examination of witnesses and documents whether there is sufficient cause to believe that a federal crime has been committed and that an indictment should issue. *Hale* v. *Henkel,* 201 U.S. 43. Thus probable cause is the result which a grand jury investigation may produce, not a condition precedent to the investigation itself. *Blair* v. *United States,* 250 U.S. 273, 283; *Hendricks* v. *United States,* 223 U.S. 178, 184. Witnesses subpoenaed *ad testificandum* may be examined although no charge is pending (*Hale* v. *Henkel, supra* at 65–66); the same is true, *a fortiori,* of corporate documents called for under a grand jury's subpoena *duces tecum.* To require a showing of probable cause before such a subpoena could issue "would stop much if not all of investigation in the public interest at the threshold of inquiry * * *." *Oklahoma Press Publishing Co.* v. *Walling,* 327 U.S. 186, 213.

For these reasons this Court has consistently rejected any requirement of "probable cause" in the ordinary sense as a basis for issuance of an investigatory body's subpoena of corporate records. *United States* v. *Morton Salt Co.,* 338 U.S. 632, 642–643, 652; *Oklahoma Press Publishing Co.* v. *Walling, supra,* at 208–209. Although these cases concern administrative writs, their reasoning applies equally to grand jury

subpoenas, as the express language of the opinions states. See, also, *Hannah* v. *Larche,* 363 U.S. 420, 449 n. 30. As the court below correctly noted (Pet. App. xv–xvi), the authorities relied upon by petitioner are not to the contrary. The writ in *Hale* v. *Henkel, supra,* was condemned not for lack of probable cause but because its scope was unreasonably broad (201 U.S. at 76)—an issue not presented here (Pet. App. xiv). *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385, involved an attempt by the government to obtain by subpoena evidence which it had discovered in an illegal search and seizure. *Boyd* v. *United States,* 116 U.S. 616, involved a method of enforcing a subpoena which incriminated without adversary proceedings: if the subpoena was not obeyed the facts alleged in it were conclusively deemed to be true. No such procedure is presented here.

The subpoenas to the petitioners would, of course, have been subject to being quashed if they were unreasonable, that is, if they were not relevant to an authorized inquiry or were excessively broad or otherwise oppressive. Unlike a search warrant, a subpoena can be tested, before it is enforced, in an adversary proceeding before a judicial tribunal, and such a proceeding in fact took place in this case. But the petitioners made no attempt to show that the subpoenas were unreasonable in any particular, and the district court properly rejected their general complaint of a lack of "probable cause."

CONCLUSION

For the reasons stated the petition for a writ of certiorari should be denied.

Respectfully submitted.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1969

No. 1106

DYMO INDUSTRIES, INC. and MODULUX, INC.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITIONERS' REPLY BRIEF

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

In the Supreme Court
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OCTOBER TERM, 1969

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DYMO INDUSTRIES, INC. and MODULUX, INC.,
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UNITED STATES OF AMERICA,
Respondent.

PETITIONERS' REPLY BRIEF

Petitioners submit that the Brief for the United States in opposition confirms that the issue of probable cause warrants the attention of this Court. The government fails to cite a single authority in which any citizen has been held in contempt for refusing to respond to a government sponsored subpoena requiring that citizen to bring documents to a grand jury where that citizen has insisted upon a showing of good cause as required by the Fourth Amendment.

The government urges expediency, but that is no answer to the Bill of Rights. The government's best case, *Okla-*

homa Press Publishing Co. v. Walling (1946), 327 U. S. 186, cited, page 9, is an anachronism insofar as its dictum, pages 208-209, may relate to the present case. And it has been so recognized by the limited treatment given to it in *See v. City of Seattle* (1967), 387 U. S. 541, at page 545:

> "... Given the analogous investigative functions performed by the administrative subpoena and the demand for entry, we find untenable the proposition that the subpoena, which has been termed a 'constructive' search, *Oklahoma Press Pub. Co. v. Walling*, 327 U. S. 186, 202, is subject to Fourth Amendment limitations which do not apply to actual searches and inspections of commercial premises."

The government's plea to the effect that rejection of the petition is required because the grand jury will expire on April 3, 1970 should not override the clear mandate of the Fourth Amendment. The motto *obsta principiis* stands in the way.

For the reasons stated in their petition, petitioners urge that the writ should be granted.

Respectfully submitted,

CARL HOPPE,

Attorney for Petitioners.